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No. ~~10-1417~~

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL
Judge of the Circuit Court of Harrison County, West Virginia,

Respondent.

From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 09-C-67-2

RESPONDENT'S RULE 14(d) [now Rule 16(g)] RESPONSE TO STATE FARM'S PETITION FOR WRIT OF PROHIBITION

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I. Questions Presented and Facts

The questions presented to this Court in State Farm's request for extraordinary relief are as follows:

> Does West Virginia recognize a public policy interest in maintaining the confidentiality of a person's medical records required to be produced in litigation?
>
> and

Was the Circuit Court's Protective Order limiting the retention and use of Plaintiff's medical records a reasonable exercise of the Trial Judge's discretion permitted under West Virginia Civil Procedure Rule 26(c)?

For the reasons set forth in this brief, and in the Respondent's First Response[1], the answer to both questions is unequivocally "Yes."

On June 16, 2010, this Court issued a Writ of Prohibition which prohibited the enforcement of a protective order entered by the Circuit Court of Harrison County ["Trial Court"] on February 11, 2010, because the Order did not allow retention of information sufficient to comply with Legislative Rule §114-15-4.2(b) and 4.4(a). [2] Those Defendants had represented to this Court that they could not adequately prepare for trial without the requested medical information of the Plaintiff.[3] After this Court's June 2010 opinion, neither of the Defendants below, Luby or State Farm, sought any further discovery from any of the Plaintiff's healthcare providers, even though the Defendants, including State Farm, were aware of the identities of such healthcare providers.

The Trial Court, on August 4, 2010, requested that the Parties "inform the Court whether they are able to jointly offer an agreed order which would modify the protective order previously entered by this Court in accordance with the Opinion of the Supreme

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[1] For clarity, the "Respondent's Brief in Response to State Farm's Writ of Prohibition," which was filed with this Court on November 10, 2010, is referred to throughout this brief as the "First Response."

[2] That Trial Court's February 11, 2010, Order which required return or destruction of such medical records at the conclusion of the case resulted in State Farm's first Petition as detailed in State ex rel State Farm Mut. Auto. Ins. Co. v. Bedell, 226 W. Va. 138, 697 S.E.2d 730 (W. Va. 2010) [hereinafter referred to as Bedell I].

[3] State Farm failed to advise this Court that the Plaintiff had provided State Farm with a medical release before retaining counsel in this case, so State Farm has possessed most of the Plaintiff's medical records relating to her injuries received in the automobile crash (her husband was killed and died at the scene) since April 2008. State Farm has impliedly represented to this Court that it had not received any medical records and this representation, or insinuation, is inaccurate.

Court..."[4] The Plaintiff attempted to reach an agreement regarding the modification of the prior Protective Order consistent with this Court's Opinion, but State Farm insisted that no protective order was necessary. State Farm now asserts, in its current Petition, that the time period for the retention of a claimants medical records, as determined by this Court in Bedell I and as set forth in §§ 114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules, is somehow inadequate. However, this point of law has been established in Syl. Pt. 7 of Bedell I, and should not be re-litigated. State Farm asserts it may retain a litigant's medical records indefinitely even in view of this Court's prior holding in Bedell I.

After receiving the Trial Court's pre-trial/status conference Order, State Farm filed a Pre-Trial Memorandum, as requested by the Trial Court, wherein State Farm objected to the Plaintiff's proposed protective order only on the grounds that such protective order would result in "private regulation of State Farm" and would attempt "to control trade secret protected property of State Farm."[5] The pre-trial/status conference was conducted by the Trial Court on September 29, 2010, at which time counsel for all parties made arguments concerning the need, or lack thereof, and form of a protective order regarding the Blanks' medical records. Ultimately, the Trial Court entered a protective order on October 25, 2010, regarding the Blanks' medical records and found that such medical records were confidential and should be protected from unnecessary disclosure or indefinite retention[6] The Plaintiff complied with the Trial Court's October 25th Order the next day, on October 26, when it delivered to the Defendants approximately 160 pages of the Blanks' medical

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[4] This request was made in the Trial Court's pre-trial/status conference Order entered August 4, 2010.

[5] *See* State Farm's "Pre-Trial Memorandum" ¶ 3, attached hereto as **"Exhibit 1."**

[6] A copy of the Protective Order is attached hereto as **"Exhibit 2."**

records and approximately 40 pages detailing the Blanks' medical bills.[7]

State Farm never sought modification, or clarification, of the Trial Court's Protective Order, but instead filed this Petition causing a postponement of an imminent trial for a second time.

This Court should deny State Farm's Petition for Writ of Prohibition as improvidently granted, and hold that the pubic policy of this State clearly mandates that a person's medical records are confidential, and that the Trial Court acted within its discretion under West Virginia Civil Procedure Rule 26(c) by reasonably limiting the dissemination and retention of medical records required to be produced in litigation.

II. The Standard For Issuing a Writ of Prohibition Is Not Met in This Case

This Court has frequently set forth the five factors that will be examined to determine whether to issue a writ of prohibition:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;

(2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;

(3) whether the lower tribunal's order is clearly erroneous as a matter of law;

(4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and,

(5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

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[7] *See* "Plaintiff's Discovery Response Pursuant to Court's October 25, 2010 Order," without attached medical records & billings, attached hereto as **"Exhibit 3."**

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 658 S.E.2d 728, 729 (W. Va. 2008) syl. pt 1; accord, State ex rel West Virginia National Auto Ins. Co. v Bedell, 672 S.E. 2d 358 (W. Va. 2008).

"These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 1, in part, Kaufman.

Additionally, this Court has held that great deference is given to the trial court when this Court determines whether to issue writ of prohibition:

> This Court has addressed the standard of review applicable to a writ of prohibition, explaining that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va.Code* 53-1-1." Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Valley Distributors, Inc. v. Oakley,* 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

State ex rel. Shepard v. Holland, 219 W. Va. 310, 313-314, 633 S.E.2d 255, 258 - 259 (W. Va., 2006).

Moreover, when a trial court's discretion involves a matter of discovery, then even greater deference is granted by this Court before it will issue a writ of prohibition. ["...where a writ of prohibition for a discretionary pre-trial ruling in a civil action was denied, this Court noted in syllabus point 1 that absent 'substantial, clear-cut, legal errors plainly in contravention of a clear statutory or constitutional or common law mandate which may be resolved independently of any disputed facts' a writ is not warranted under the flagrant abuse of discretion theory of prohibition." Weikle v. Hey, 179 W. Va. 458, 460, 369 S.E.2d 893, 895 (W. Va.1988) (internal citations omitted)].

In this case the Trial Court's exercise of discretion involved a discovery matter under Rule 26(c) and State Farm has not satisfied any of the required five factors, established by this Court, for the issuance of a Writ. State Farm can seek relief on direct appeal and will not be prejudiced as it has received all discoverable medical records pursuant to the Trial Court's Protective Order. The Trial Court's Protective Order is consistent with this Court's holding in Bedell I and is not "clearly erroneous as a matter of law" nor does it represent "an oft repeated error or manifests persistent disregard for either procedural or substantive law." Finally, the Protective Order does not raise "new and important problems or issues of law of first impression" as this very issue was previously addressed by this Court in Bedell I.

Therefore, this Court should deny State Farm's Writ as improvidently granted because State Farm has failed to satisfy the required five factors. Alternatively, this Court should deny the Writ based on the public policy of this State to maintain the confidentiality of a litigant's medical records.

III. ARGUMENT

A. The Public Policy of this State and of the United States Recognizes that a Person's Medical Records are Inherently and Presumptively Private and Confidential and Should be Protected from Indefinite Retention or Unconsented Disclosure

1. The Public Policy of this State Required the Entry of a Protective Order to Protect the Plaintiff's Private and Confidential Medical Records

The public policy of this State, as expressed by the Constitution, case law, public

statutes, and "the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government...is factually established" supports a finding by this Court that a person's medical records are private and confidential and should not be compiled or disseminated without an express and compelling reason, unless consented to by such person. *See* Willey, infra.

This Court has recently reiterated that: "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syllabus point 2, Willey v. Bracken, — S.E.2d —, 2010 WL 4025599 (W. Va. 2010). In Willey, Chief Justice Davis recognized that "'[p]ublic policy' is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good even though no actual injury may have resulted therefrom in a particular case to the public." Id. (internal citations omitted). The public policy of the State of West Virginia is derived from a number of sources:

> [t]he sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government-with us-is factually established.

Id. citing Morris v. Consolidation Coal Co., 191 W. Va. 426, 433 n. 5, 446 S.E.2d 648, 655 n. 5 (W. Va. 1994) (additional citations omitted).

This Court also held in Willey that West Virginia public policy supersedes any conflicting regulations or statutes. Id. [holding that West Virginia public policy prevented the application of W. Va. Code § 55-2A-2 to a plaintiff's claims even though a plain reading

of the statute would bar the plaintiff from pursuing, at least some of his claims, against the defendants]. State Farm's position that it should be permitted to maintain medical records forever is not supported by, and is in fact contrary to, the public policy of this State. As set forth herein, West Virginia public policy clearly permits a Trial Court to enter a protective order preserving the privacy of a litigant's medical records which includes how long an opposing party, an expert, an insurance company or anyone else, may retain such confidential information **after** the litigation has concluded.

West Virginia law is replete with statutes and case law recognizing the privacy of a person's medical records which translates to the need for protection that the Trial Court accorded in this case. The most notable and significant expression of the public policy determination in the United States indicating the need to protect a person's medical records emanates from Congress's enactment of HIPAA [The Health Insurance Portability and Accountability Act]. That federal act codified privacy protections for medical records and information, and criminalized [42 U.S.C .§1320d-6 (1996)] the unauthorized disclosure of protected health information. An entire body of research and federal Regulations exist to implement the privacy protections of HIPAA.[8] The U.S. Department of Health and Human Services [HHS] has an entire division to enforce HIPAA privacy requirements regarding people's medical records. The HHS, through its Office of Civil Rights, requires both Physical Safeguards and Technical Safeguards regarding the protection of medical records including healthcare providers, i.e. hospitals and physicians, who must maintain

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[8] See generally," Health Information Privacy" (http://www.hhs.gov/ocr/privacy/); "Unsure how to handle HIPAA?" (HIPAA.org); "Report to Congress, Health Information Technology: Early Efforts Initiated but Comprehensive Privacy Approach Needed for National Strategy", Jan.2007 (http://www.gao.gov/new.items/d07238.pdf)

a person's medical records to deliver health care services. The HIPAA required safeguards as set forth in the Code of Federal Regulations [45 C.F.R. §164.310-312] include:

Physical Safeguards

- **Facility Access and Control.** A covered entity must limit physical access to its facilities while ensuring that authorized access is allowed.

  Workstation and Device Security. A covered entity must implement policies and procedures to specify proper use of and access to workstations and electronic media. A covered entity also must have in place policies and procedures regarding the transfer, removal, disposal, and re-use of electronic media, to ensure appropriate protection of electronic protected health information (e-PHI).

Technical Safeguards

- **Access Control.** A covered entity must implement technical policies and procedures that allow only authorized persons to access electronic protected health information (e-PHI).

  Audit Controls. A covered entity must implement hardware, software, and/or procedural mechanisms to record and examine access and other activity in information systems that contain or use e-PHI.

  Integrity Controls. A covered entity must implement policies and procedures to ensure that e-PHI is not improperly altered or destroyed. Electronic measures must be put in place to confirm that e-PHI has not been improperly altered or destroyed.

  Transmission Security. A covered entity must implement technical security measures that guard against unauthorized access to e-PHI that is being transmitted over an electronic network." [9] (footnotes omitted)[10]

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[9] "Summary of the HIPAA Security Rule", HHS website:
[http://www.hhs.gov/ocr/privacy/hipaa/understanding/srsummary.html]

[10] Although requested, State Farm has never revealed if it maintains such safeguards for claimants medical records it receives and scans onto its Companywide database accessible to almost all of its personnel; *See* excerpts from the deposition of Thomas Fitzsimmons, a State Farm claims representative and

HIPAA's stated purpose is to protect patients' privacy rights and prevent unauthorized disclosure of medical records.[11] The *Summary, by the HHS Office of Civil Rights,* referenced in Footnote 11 herein, is an excellent expression of the public policy privacy considerations incorporated in HIPAA which are at issue in this case.

Additionally, HIPAA sets forth certain requirements to protect medical records requested for use in judicial proceedings including limitation of use to the instant proceeding, and return or destruction of the medical records, both of which the Trial Court provided below. HIPAA's required qualified protective order [QPO] is defined as **"an order that: "(A) *Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested*; and (B) *Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.*"** 45 C.F.R. § 164.512(e)(1)(v). Under HIPAA's Disclosures for Judicial and Administrative Proceedings, disclosure of a person's medical records by a covered entity is not permitted without the entry of a "qualified protective order." 45 C.F.R. § 164.512(e)

The Federal Court for the Southern District Court of West Virginia recently held that HIPAA permits the disclosure of a person's private medical records for judicial proceedings in two instances, both of which require entry, of a "qualified protective order" under HIPAA:

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designated 30(b)(7) witness, taken in Murray v. Rogers, Civil Action No. 08-C-86-3, attached hereto as **"Exhibit 4."**

[11] *See* HHS, Office for Civil Rights, *Summary of the HIPAA Privacy Rule,* available at: http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf [last revised May 2003) [The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing.]

> "The HIPAA regulations permit disclosure of a person's private medical and mental health information pursuant to a court order **if a protective order is in place to prohibit disclosure of the information for a purpose other than the litigation and to require return of the information at the conclusion of the proceedings.** 45 C.F.R. § 164.512(e)(1)(i); *A Helping Hand, LLC v. Baltimore Co., Maryland,* 295 F.Supp.2d 585, 592 (D.Md.2003). "[O]nly the information expressly authorized by such order" may be disclosed. 45 C.F.R. § 164.512(e)(1)(i). The Agreed Protective Order which is found on the court's website (LR Civ P 26.4) meets both criteria. An alternative method of obtaining disclosure of protected information, pursuant to a subpoena, discovery request, or other lawful process, entails notice to the individual whose records are sought, an opportunity for the individual to raise an objection, resolution of any objections, **plus the described protective order.** 45 C.F.R. § 164.512(e)(1)(ii); Law *v. Zuckerman,* 307 F.Supp.2d 705, 711 (D.Md.2004)."[12]

Fields v. West Virginia State Police, 264 F.R.D. 260, 262 (S.D.W.Va., 2010) (emphasis added)

West Virginia has likewise recognized the need to protect litigants' medical records from unnecessary disclosure based on privacy rights emanating from varying sources. In numerous cases, this Court has recognized that medical records are provided to healthcare providers in confidence with the expectation of privacy and, thus, such records are inherently private and subject to judicial protections similar to the protections granted by the Trial Court in this case. This Court has previously stated that "[t]here is no question that disclosure [of medical records] would cause an invasion of privacy. An individual's

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[12] The qualified protective order example referenced by the District Court is attached hereto as **"Exhibit 5"**; that QPO restricts use of any such medical information to the case for which it was produced and also requires return of all copies at the end of the litigation; this Court also has a suggested QPO in the Mass Tort section of its website [the QPO is attached hereto as **"Exhibit 6"**]; this Court's QPO is an example of a HIPAA compliant QPO; it restricts dissemination, especially to trade association databases like ISO or similar databases like NCIB, and retention of such information while preserving an insurance company's legitimate use in the protected person's case and for underwriting related to the protected person but not to **"be used for any record compilation or database of Plaintiff's/ Claimant's claim history".** Order at ¶ 2(b); Likewise, the Trial Court's Protective Order complied with HIPAA.

medical records are classically a private interest." Child Protection Group v. Cline, 177 W. Va. 29, 34, 350 S.E.2d 541, 545 - 546 (W. Va.1986) [allowing discovery of medical records including psychological records but limiting who could view such records and restricting dissemination]. This Court has also explicitly held that "A fiduciary relationship exists between a physician and a patient." State ex rel. Kitzmiller v. Henning, 190 W. Va. 142, 144, 437 S.E.2d 452, 454 (W.Va. 1993) syl.pt. 1. The Kitzmiller Court explained that "[i]nformation is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard." Id., 190 W. Va. at 144, 437 S.E.2d at 454. This Court has further recognized that a litigant does not consent to a release of all of his or her medical information by filing suit and that irrelevant medical records are not discoverable. Keplinger v. Virginia Elec. and Power Co., 208 W. Va. 11, 23, 537 S.E.2d 632, 644 (W. Va. 2000). The Keplinger Court explained that a person's medical records are very private, and can be embarrassing, and that a person should not be deterred from filing a civil suit for fear that her private medical information will be improperly disclosed:

> The reason for this principle is that a person's medical records may contain information that is totally unrelated to a civil action they have initiated. Often, such unrelated medical information is considered by the patient to be very private or, perhaps, embarrassing. When a potential plaintiff desires that medical information unrelated to a civil action remain private, he or she should be able to maintain the confidentiality of that information. A person should not be deterred from filing a civil suit that places a medical condition into issue for fear that unrelated private or embarrassing medical information may be disclosed.

Keplinger, 208 W. Va. at 23, 537 S.E.2d at 644.

The Keplinger Court further recognized that "our Legislature has nevertheless acknowledged the special confidential nature of certain medical records." Keplinger, 208 W. Va. at 23, 537 S.E.2d at 644. Our Legislature has impliedly, if not directly,

acknowledged that medical records are private and entitled to confidential treatment. *See* W. Va. Code § 57-5-4d [relating to obtaining medical records as evidence for legal proceedings and requiring consent and waiver of "privilege of confidence" of person whose medical records are being requested]; With respect to mental health information, our Legislature has specifically stated that "[c]ommunications and information obtained in the course of treatment or evaluation of any client or patient are confidential information." W.Va. Code § 27-3-1(a) [2008] which provides confidentiality of mental health records and prohibits disclosure without a court order; many family physicians treat situational depression, hormonal mood swings and other similar illnesses which would be considered mental or emotional problems and it is difficult to distinguish and separate such records from other treatment records of one's general physician; W.Va. Code §16-29G-8 [establishing Health Care Authority and requiring compliance with HIPAA and state confidentiality laws to protect patients medical information]; and W. Va. Code § 29B-1-4(a)(2) [exemption of medical records from FOIA as an unwarranted invasion of privacy; see also Cline, supra.]. The Legislature's recognition of the inherent privacy accorded to medical records is further illustrated by its decision to specifically exclude medical records from disclosure under the West Virginia Freedom of Information Act.[13] This Court ultimately determined in Keplinger that, "[b]ecause of the highly personal and confidential nature of medical records, they should be subject to special consideration to assure that, in the process of discovery, there will be no unnecessary disclosure of medical information that is outside the scope of the litigation." Keplinger, 208 W. Va. at 23, 537 S.E.2d at 644

[13] *See* W. Va. Code § 29B-1-4(a)(2) which provides that medical information is not to be disclosed "unless the public interest by clear and convincing evidence requires disclosure in the particular instance[.]"

(emphasis added).

Also worth noting is that the above cases considered prohibiting any discovery of medical records that may be too expansive (Keplinger), the *ex parte* obtaining of medical information outside the discovery process (Kitzmiller) and finding a fiduciary relationship between patient and physician prohibiting contact by opposing parties with such healthcare provider, even though it was argued that such contact was necessary to prevent worker's compensation fraud (Morris). Those cases imposed far greater restrictions on the obtaining and use of medical records and information than what was requested in this case. In the case *sub judice*, the Plaintiff, Carla Blank did not request that the Court prohibit the production of her medical records, but rather that she be granted reasonable protections regarding use, dissemination and length of retention of her, and her deceased husband's, confidential medical records.

Another source of our public policy that provides privacy protection for a person's medical records includes one's privacy rights as found in the West Virginia Constitution. W. Va. Const. Art. 3, § 1 provides: "All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." Id. This Court recently reaffirmed the long held precedent that an individual has a right to keep his private communications and affairs secret: "The right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or

violation of which gives rise to a common law right of action for damages." Syl. Pt. 16, O'Dell v. Stegall, — S.E.2d —, 2010 WL 4813671 (W. Va., 2010)(internal citations omitted). While Carla Blank is not seeking, or attempting to create, a cause of action for damages in this case, the O'Dell case affirms that West Virginia public policy gives a person a right to keep private communications and affairs secret. Clearly, nothing could be more private then communications and information exchanged between a patient and his or her healthcare providers.

Numerous Courts and Legislative bodies have recognized that people have a right to privacy that includes protections against unnecessary disclosure for obviously confidential records. For example, people have a right to keep their tax records private[14] and unauthorized disclosure may result in civil and/or criminal penalties.[15] Additionally, courts have held that people have a right to keep their social security numbers private.[16] People even have a right to privacy regarding the identification of video tapes they rent or purchase.[17] The United States Supreme Court and this Court have held that people have a right to privacy to prevent disclosure of "rap sheets" maintained by the Federal Bureau of Investigation (FBI), even though the information and events contained therein are a

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[14] Town of Burnsville v. Cline, 188 W. Va. 510, 425 S.E.2d 186, (W. Va. 1992), and Scrimgeour v. Internal Revenue, 149 F.3d 318, 328 (4th Cir.,1998)

[15] *See* W. Va. Code § 11-10-5d (a) [2007] and 26 U.S.C. § 7431 [1998]

[16] Greidinger v. Davis, 988 F.2d 1344 (4th Cir.,1993) and Meyerson v. Prime Realty Services, LLC, 7 Misc.3d 911, 917, 796 N.Y.S.2d 848, 854 (N.Y.Sup., 2005).

[17] 18 U.S.C. § 2710 [1988].

matter of public record.[18] This Court has even held that in the absence of "exceptional circumstances," a governmental entity is not to release a person's criminal history at the request of a private party in civil litigation.[19]

Surely, if these types of records and information, especially one's criminal history, are considered private, then medical records must be considered inherently private as nothing could be considered more private and confidential than one's medical records. As such, "good cause" is established for the entry of a Protective Order under Rule 26(c) because medical records, by their very nature, are private and confidential and deserving of court protection when the same are produced pursuant to the authority of the court.

State Farm asserts that the Trial Court's Protective Order "is outside the mainstream of law across the country." [State Farm Petition, pgs. 2 & 16] This assertion is entirely inaccurate.[20] Various courts have found a significant privacy interest in the confidentiality of one's medical records both under state constitutional provisions and as embodied in the scope and purpose of HIPAA. For example, the Supreme Court of Hawaii has held that HIPAA is the "federal floor of privacy protections that does not disturb more protective rules or practices.... The protections are a mandatory floor, which other governments and any [Department of Health and Human Services regulated] entities may exceed." Brende v.

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[18] U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 109 S.Ct. 1468 (U.S., 1989).

[19] Syl. Pt. 3, State ex rel. West Virginia State Police v. Taylor, 201 W. Va. 554, 556, 499 S.E.2d 283, 285 (W. Va. 1997)

[20] State Farm has been aware of medical protective orders for many years wherein the trial court entered Orders protecting the confidentiality of a plaintiff's medical records. *See* Miller v. Fluharty 201 W. Va. 685, 500 S.E.2d 310 (W. Va. 1997). This is evidence that this issue is not new to State Farm as asserted in its Petition.

Hara, 113 Hawaii 424, 429, 153 P.3d 1109, 1114 (Hawaii, 2007) citing 65 Fed.Reg. 82,462 (Dec. 28, 2000). Thus, in Hawaii, a medical information protective order issued in a judicial proceeding must, at a minimum, provide the protections of the [sic] HIPAA." Brende, 113 Hawaii at 429, 153 P.3d at 1114. The Brende Court also held that, based on Hawaii's Constitution, similar HIPAA like restrictions applied to the Defendant's insurance carrier and mandated the entry of a Protective Order stating that "none of the plaintiffs' protected health information and/or medical information obtained in discovery from any source in Civil No. 05-1-0108 shall be disclosed or used for any purpose by anyone or by any entity outside of Civil No. 05-1-0108 without the plaintiffs' explicit written consent thereto." Id. 113 Hawaii 432, 153 P.3d. 1117.

In Flaherty v. Seroussi, 209 F.R.D. 300 (N.D.N.Y., 2002), the Federal District Court of New York found that medical and educational records of individual litigants are "inherently private information." Id. at 304. Based on this potential for embarrassment, which could occur from unauthorized dissemination of any medical and educational records, that Court held that "such records are of a nature deserving of Rule 26(c) protection[,]" and entered a Protective Order. Id.

Other jurisdictions have recently enacted specific Rules which guarantee all litigants the HIPAA like protections which Carla Blank sought through a protective order by prohibiting "[a]ny person or entity receiving such a [medical] record may not reproduce, distribute, or use it for any purpose other than the litigation or claim for which it is produced." *See* South Dakota Supreme Court, "Medical Privacy Rule 10-07" attached hereto as **"Exhibit 7."**

Accordingly, the public policy of West Virginia requires that medical records be considered as inherently private and confidential. Public policy also mandates that such documents (medical records) belong to the person to whom they pertain, not to a defendant, or a defendant's insurance carrier, like State Farm, which may be permitted to acquire such documents through the discovery process. This Court, and our Legislature, have impliedly, if not directly, recognized that a litigant's medical records are confidential and subject to reasonable restrictions when those medical records are necessary for litigation. Other Courts have recognized that a litigant's medical records are, by their very nature, private records entitled to protection under Rule 26. As such, this Court should find that under the public policy of this State, that medical records are inherently private and confidential and, when produced under court discovery rules during litigation, are subject to reasonable protections limiting use, retention and dissemination pursuant to Rule 26(c). Thus, this Court should find that the Trial Court had "good cause" to enter its Protective Order as it still permitted the opposing parties to receive and use the subject medical records for this case.

2. The Trial Court's Protective Order was consistent with this Court's holding in State ex rel State Farm Ins. Co. v Bedell

This Court issued two holdings in State ex rel State Farm Ins. Co. v Bedell.[21] First,

[21] In Bedell I, this Court also observed, in *dicta*, that the Insurance Commissioner had promulgated W. Va.C.S.R. § 114-57-15 (2002) to protect an insured's confidentiality. Bedell I, at 738. However, this section of the Code of State Rules specifically exempts "claims administration; claims adjustment and management" from the provisions provided for in Series 57. W. Va. C.S.R. 114-57-15.2 (2002). State Farm seeks a copy of the Plaintiff's medical records specially for the purpose of administering, adjusting and managing the Plaintiff's claims against the Estate of Jeremy Thomas, a State Farm insured. Thus by the specific language of the Rule, the WVIC's regulations deny the Plaintiff any protections as set forth in § 114-

this Court held that "A court may not issue a protective order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by the Insurance Commissioner of West Virginia in §§ 114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules for the retention of such records." Syl. Pt. 7, Id. Specifically, the Insurance Commissioner's regulations "require insurers to maintain claim files, including medical records, for approximately five to six calendar years." Bedell I at 738. **Importantly, this Court did not hold that a tortfeasor's insurance carrier is permitted to retain copies of a Plaintiff's medical records, received in litigation, in perpetuity to be used for purposes other than the case in which such records were produced, even though such was requested by State Farm in Bedell I.** [22]

Secondly, this Court held that the Circuit Court's Protective Order did not provide a basis, nor had the Plaintiff produced any evidence, for restricting electronic scanning and storage of the plaintiff's medical records, and, subsequently, this Court granted State Farm's Petition on this ground as well. Id. Therefore, to comply with this Court's prior mandates in Bedell I, a protective order regarding a litigant's medical records could not require an insurer to destroy or return such medical records before the time period set forth in the WVIC's regulations, and, absent evidence as to why scanning should not be permitted, a protective order should not restrict the method of storage of the medical records, including storage by electronic means during the time of retention.

57-15 cited by State Farm, and previously cited by this Court in Bedell I.

[22] Also in Bedell I, the Court was concerned that no medical records be disseminated to trade organizations such as the NICB or ISO as evidenced by Justice Workman's inquiry at oral argument to State Farm's counsel whether State Farm was seeking authority to do so which State Farm answered "no".

The Trial Court's Protective Order in this case complied with both of these mandates. First, the Trial Court's Protective Order specifically states that all medical records and information may be retained until the "conclusion of the appropriate period established by W. Va. C.S.R. § 114-15-4.2(b)[.]" [Protective Order, p. 5, ¶ 2] The Trial Court's Order specifically calculated the appropriate time period. Id. Second, the Trial Court's Protective Order does not restrict the method or manner of storage of the Blanks' medical records during the retention period.[23]

Accordingly, the Trial Court's Protective Order fully complied with this Court's mandate in State ex rel State Farm Ins. Co. v. Bedell.

3. The Circuit Court Should Have Broad Discretion to Manage and Control Discovery

This Court has long held that "A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion." Syl. Pt. 8, State ex rel. Myers v. Sanders, 206 W. Va. 544, 546, 526 S.E.2d 320, 322 (W. Va. 1999). What possible injustice could occur by a trial court protecting the confidentiality of a litigant's medical records as long as all parties have access to use those documents in the proceeding? In this State and many others, opposing parties are restricted to using the formal discovery process to obtain another party's medical information. State ex rel.

[23] West Virginia Mutual Insurance Company incorrectly claims that the Protective Order prohibits the maintenance of medical records in an electronic format. *See* Mutual amicus brief, p. 15. This assertion is erroneous, the Trial Court's Protective Order does not contain any prohibitions regarding the electronic storage of medical records; however the Plaintiff maintains that if such electronic storage results in excessive accessibility and does not comply with the safeguards established by HIPAA , as apparent from the State Farm claims adjusters deposition in an unrelated case (*See* Exhibit 4 attached previously hereto), then a more restrictive protective order may be warranted, but discovery has not yet been completed on this issue.

Kitzmiller, supra. Litigants must use the discovery process to obtain medical information and trial courts have broad discretion to control and manage discovery. The Circuit Court of Harrison County had broad discretion to enter a Protective Order, regarding the Blanks' confidential medical records that were produced pursuant to discovery, and no injustice has occurred to Defendant Luby or State Farm as both have all relevant medical records to evaluate and prepare their case. What these Defendants were not granted, nor should they be, was the unfettered right to retain and disseminate confidential documents for purposes unrelated to this case.

In this case, the Trial Court's Protective Order serves multiple purposes under Rule 26. In addition to ensuring that the Blanks' medical records remain confidential, and that no one retains copies of the Blanks' medical records in perpetuity, the Protective Order also helps to streamline the discovery process, as it prevents the Trial Court from reviewing each and every medical record, page by page, in an attempt to determine what should be protected under Rule 26(c). Medical records are similar to a person's tax returns, and the review of each page or entry and attempting a redaction is not productive. A tax return is inherently confidential in its entirety and, logic dictates the same must be true for medical records. It would be a painstaking exercise for a Trial Court to review hundreds of pages of medical records in an attempt to identify what parts reveal embarrassing or humiliating information. Not only is such a waste of scarce judicial resources, but most likely such efforts would be fraught with errors as most judges and attorneys are not equipped to parse through abbreviated medical records to determine what might be revealing of such embarrassing or humiliating information. All this underscores the need for a protective

order regarding a litigant's confidential medical records and medical information. Medical records are replete with such delicate information labeled in uncornmon language and abbreviations which a plain reading of such information may not appear to divulge potentially embarrassing or humiliating information. For example, what does "gravida 2, para 1, ab 1" reveal about a patient? It means that the patient has been pregnant twice (gravida 2), had one live birth (para 1) and one abortion. Is such information private? Embarrassing if disclosed? Of course.

The fact that one is suffering from depression is extremely private, and potentially embarrassing, and medical records necessarily include medication descriptions which often reveal the underlying condition being treated. For instance, when a patient is prescribed Lexapro or Efexor or Cymbalta, or a host of other anti-depressant drugs, such indicates to a knowledgeable person that depression is the underlying ailment. Likewise, someone taking medication for sexually transmitted diseases such as acyclovir, famiciclovir, or valacyclovir has their illness, and perhaps their lifestyle, revealed to all who obtain such medical information. Such medical information is obviously confidential and potentially embarrassing, and would not be information that a person would likely desire to have kept by State Farm for 30 years, or forever. Nor would a litigant likely want a defendant they have sued, or an insurance company like State Farm, to be able to disseminate to other persons or other insurance carriers or trade groups like NICB, such private and confidential information.

Accordingly, the Trial Court was well within its broad discretion, to manage and control discovery under Rule 26, when it entered the Protective Order in this case.

4. The Plaintiff's Medical Records are Inherently and Presumptively Private and Confidential and, as such, "Good Cause" Exists to Protect the Blanks' Medical Records Under Rule 26(c)

State Farm claims that Bedell I only allows for two methods of demonstrating the necessity of a medical confidentiality order. [State Farm Petition, p. 10.] Thus, State Farm asserts that Carla Blank has only two methods for proving entitlement to a Protective Order which protects confidential medical information in this case: "a showing of either a past failure of State Farm to comply with the state privacy rule and Insurance Commissioner regulations or a reasonable basis that State Farm intended to disseminate private medical information without the claimant's consent in the future." [State Farm Petition p. 10.]

Contrary to State Farm's claims, the Bedell I case did not limit a litigant's right to seek a Protective Order to these limited circumstances. The Court was merely citing examples for how a litigant could demonstrate the need for a Protective Order, all of which was *dicta*. However, this Court may have erroneously believed that C.S.R. § 114-57-15.1 (2002) protected the unauthorized dissemination of a litigant's medical records, but it does not. Nowhere in its opinion did this Court hold that the only means of demonstrating the necessity for a protective order was limited to those two bases. Also, this Court did not render such a broad holding, as it would have been a new point of law, and would have been articulated in a syllabus points as required by our State constitution. Syllabus Point 2, in part, Walker v. Doe, 558 S.E.2d 290 (W. Va. 2001). The examples cited in Bedell I were just that, examples cited in *dicta*, and were obviously not a complete list of the

grounds upon which one could show the necessity of a medical protective order.[24] The Trial Court had an adequate basis for the entry of its Protective Order as State Farm has been previously found by a court to have improperly used a claimants medical records received for claim adjustment purposes, to attack the credibility of that claimant who happened to be a healthcare professional, in different unrelated case. A.T. v State Farm, 989 P.2d 219 (Col. App. 1999). State Farm has also asserted that once medical records are received it can disclose them to third party's without consent of the person. See Footnote 24 infra.

In its Protective Order, the Trial Court held that "the Plaintiffs have demonstrated good cause for the issuance of a reasonable protective order as to the confidentiality of said records[.]" [Protective Order, p.2] More specifically, the Trial Court held that "[t]herefore, the Plaintiffs have demonstrated a 'particular and specific demonstration of fact,' as well as good cause, for the issuance of an appropriate protective order." [Protective Order, p. 4, citing W. Va. Civ. Pro. R. 26]. The Trial Court further made the following specific findings supporting its holdings that the Plaintiffs demonstrated a "particular and specific demonstration of fact" and that "good cause" was established:

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[24] This Court's exact language was "She [Carla Blank] presents no evidence, however, that State Farm has failed to comply with West Virginia Code of State Rules § 114-57-15.1, nor any facts which would show a reasonable basis for believing that State Farm intends to disseminate her 'nonpublic personal health information' without her consent in the future. Indeed, Mrs. Blank has not even presented any evidence regarding State Farm's policies for the retention of such records, nor does she attempt to explain why the Insurance Commissioner's legislative rule governing the confidentiality of a claimant's medical records is insufficient to protect her information." Bedell I at 739; unfortunately this Court's *dicta* was imprecise as a careful reading of 114-57-15.1 indicates that the regulation exempts claims administration and only protects a "customer's" information, not a Plaintiff like Mrs. Blank. A protective order prevents what may occur and one should not have to prove wrongdoing before being entitled to a protective order as it is then too late; however State Farm has been found to use such information wrongfully, see A.T. v State Farm, infra., and State Farm has also asserted it is entitled to disseminate such information to a third party, such as its trade group, NCIB without consent of the Plaintiff, which would be a violation of the Regulation if it applied but it does not. [State Farm Petition pgs. 2 & 7]

> Specifically, the Court notes that medical records are private in nature and are protected by privilege between the treating physician or care provider and the patient. Further, medical records have the potential to contain facts that are embarrassing to the patient, and the law recognizes that the dissemination of medical records must be done with the patient's consent. Further, the Supreme Court recognized the same, "here none of Mrs. Blank's medical records will become public unless she consents to their dissemination or until they are introduced at trial." Id [Bedell I] at 739-740. Finally, the Defendants, both in oral argument before the Supreme Court and in their proposed "Protective Order," have stated that the Plaintiffs are entitled to a reasonable protective order. It is the terms of the Order that the Defendants have issue with, not the valid justification for a general protective order.

[Protective Order, p. 3]

Essentially, the Trial Court held that medical records are inherently private and confidential and, as such, that "good cause" was established to enter the Protective Order. The Trial Court's holding that medical records are inherently private is supported by the law of this State and other jurisdictions. Furthermore, the public policy of this State supports, perhaps even mandates, the entry of a protective order regarding a litigant's confidential medical records produced in discovery.

While the burden to demonstrate entitlement to a protective order lies with the proponent, such is not a significant burden. Once a document is established to be confidential, then a protective order can be entered in the discretion of the trial court. Medical records are clearly confidential as demonstrated by the public policy of this State.[25] Importantly, a litigant should not have to wait until there is an unauthorized disclosure of

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[25] This Court in State ex rel Nationwide v Marks, 676 S.E.2d 156 (W. Va. 2009) impliedly approved the trial court's entering of a protective order and review *in camera* of insurance settlement agreements that had been labeled by the insurance company as "confidential"; surely if such protective measures are warranted when an insurance company desires its payouts to remain confidential so that other claimants won't be aware of the "going rate", then medical records containing our most private personal matters deserve the same recognition especially since neither Congress or our Legislature has indicated a public policy to protect the privacy of insurance settlements as both have expressed regarding medical records.

confidential materials, assuming such could be determined by such person, before being granted protection under Rule 26(c). Such an argument, as proffered by State Farm, is not only illogical, but self-serving.

This Court also questioned in Bedell I, why the Plaintiff had not presented to the Trial Court, "evidence regarding State Farm's policies for the retention of such records[,]" presumably to support the Plaintiff's request that the Trial Court restrict the scanning of such medical records onto State Farm's Company wide databases. Bedell I at 739. After remand, the Plaintiff attempted to obtain such evidence by subpoena to State Farm[26], regarding State Farm's policies and procedures for storing, retaining, accessing, and destroying medical records which it received in litigation. Unfortunately, State Farm wishes "to have its cake and eat it too," as State Farm resisted the request by filing a Motion to Quash claiming that its internal policies and procedures are not relevant and further claiming that the Plaintiff's attempt to discover such information was an attempt to act as a "private regulator"[27] On November 9, 2010, the Trial Court granted State Farm's Motion to Quash, and ruled that this issue was moot as the Trial Court had already determined that the Plaintiff had established "good cause" for the granting of the Protective Order.[28]

B. Litigants, and their Insurance Companies, Should not be Permitted to Retain Medical Records Indefinitely

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[26] The Subpoena Duces Tecum is attached hereto as **"Exhibit 8."**

[27] State Farm's Motion to Quash is attached hereto as **"Exhibit 9."**

[28] The Trial Court's Order is granting the Motion to Quash is attached hereto as **"Exhibit 10."**

Ultimately, State Farm's goal is that it be permitted to retain litigants' personal and private medical records indefinitely to ensure that State Farm may use them for whatever purpose it desires. Such is clear, as State Farm, despite being given multiple opportunities, has repeatedly refused to provide the Trial Court with an alternative time period for retention of a litigant's medical records. Furthermore, at oral argument before this Court in Bedell I, State Farm represented that it did not wish to keep medical records indefinitely. However, State Farm has since "changed its tune" as it now asserts that the retention period set forth in W. Va. C.S.R. § 114-15-4.2(b), and as adopted by this Court, is inadequate. In a desperate attempt to bolster this argument, State Farm cites various statutes and circumstances which are not relevant to this case nor supportive of State Farm's position. Essentially, State Farm is trying to "parade the horribles." Nothing in the West Virginia Insurance Commissioner's regulations, nor in the West Virginia Code, requires or suggests that insurance companies can retain copies of a litigant's medical records forever. To the contrary, all of the laws and regulations recently enacted to protect the privacy of medical records, including HIPAA, provide otherwise. 45 C.F.R. § 164.512(e)(1)(v) [requiring in a Qualified Protective Order for return or destruction of Protected Healthcare Information produced for litigation at its conclusion].

State Farm argues that the statute of limitations for breach of contract claims is ten (10) years and that cases involving minors or disabled persons have extended statutes of limitations. [State Farm Petition, pgs. 14-15] However, in its Petition, State Farm admits

that a breach of contract "claim is already filed in the present civil action[.]"[29] Id. at 14. Accordingly, as the Plaintiff has already asserted such an action in this case, State Farm admits that its argument is not applicable to this case. Similarly, this case does not involve any minors or disabled persons, so State Farm's arguments in this regard are simply hypothetical and completely inapplicable to this case.

State Farm also asserts that files for cases involving structured settlements must be maintained for extended periods of time. However, this case does not involve any structured settlement, so once again, State Farm's argument is inapplicable to this case. Merely because a structured settlement is part of a final settlement would not warrant indefinite retention of medical records and the concomitant invasion of privacy to an innocent victim of an impaired driver, like the Blanks in the case *sub judice*. Such would be overkill in the balancing of equities. Finally, State Farm argues that medical records related to Medicare recipients must be maintained for extended time periods. State Farm does not provide or pay Medicare benefits in civil litigation claims. Also there is no assertion that Medicare has provided any benefits, or will provide any future benefits, to the Plaintiff as a result of the car crash in this case so State Farm's argument in this regard is also factually inapplicable to this case. Furthermore, such would have no bearing on the terms of a protective order.

Ultimately, all of these arguments are speculative as State Farm has engaged in "throw in the kitchen sink" briefing. State Farm provides no basis for why this Court should

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[29] State Farm attempts to save its hypothetical argument by asserting that, if the Plaintiff had not already filed a breach of contract claim, "it could have been filed after the conclusion of the underlying tort claim up to 10 years from the date of the alleged breach." However, it is clear that State Farm's argument, by its own admission, is completely moot.

condone an invasion of a litigant's privacy other than to satisfy State Farm's speculative musings. Such would be especially inappropriate considering that such medical records are available from their original source, if the records, as speculated by State Farm, are needed at a later time. State Farm's theory is essentially that no medical record should be returned or destroyed because there is a slight chance that sometime in the future it might prove handy. State Farm has provided no concrete support justifying such retention in this case or any other case, and a litigant's medical records should not be subject to such "Big Brother" compilation as the potential harm far outweighs any remote benefit.[30] State Farm has offered no reason why this Court should abandon its recent holding, and thus disregard *stare decisis*, by reversing its decision in Bedell I. State Farm fails to offer any reasonable basis for this Court to, grant what it denied State Farm in Bedell I, and abandon its holding that a protective order may direct return or destruction of medical records after the time period set forth in W. Va. C.S.R. § 114-15-4.2(b). The Legal Ethics Opinion 2002-01 regarding the retention and destruction of an attorney's closed client files, which is cited in State Farm's brief, although not relevant to State Farm, also provides no support for State Farm's position as the opinion recommends that attorneys keep client records for a minimum of five years, which is consistent with the Trial Court's Protective Order. Furthermore, the Protective Order in this case specifically allowed for Defendants' counsel to retain a sealed copy of the medical records produced in this case without any time limitation as an attorney is an officer of the Court and subject to the Rules of

[30] As noted in the Report to Congress (pgs. 9-10) referenced above, a 2005 Harris survey found that 70% of Americans were concerned that electronically stored medical records would be leaked or otherwise improperly exposed.

Professional Responsibility. Thus, State Farm's examples and argument are without merit. [Protective Order, p. 6, ¶ 2]

Ultimately, the inescapable conclusion is that State Farm wants to retain a litigant's medical records to use them for other claims, and that cannot be allowed by this Court. An innocent victim of a driver under the influence, such as Carla Blank, should not lose her privacy merely for being in the wrong place at the wrong time. Carla Blank did not lose her privacy rights in her medical records merely because she was forced to file suit.[31]

State Farm's position that it can maintain a party's medical records indefinitely is contrary to HIPAA , the public policy of this State and this Court's holding in Bedell I. Such an argument defies common sense and is not justified by any evidence presented to the Trial Court, as all arguments and "evidence" presented by State Farm were only supposition and speculation. In most instances, a liability insurance company, like State Farm, will receive medical records through the attorney it has hired under the insurance contract, which means that, generally, the insurance carrier is not even a party to the litigation in most cases. This Court should give little, if any, weight to any argument that a non-party with no standing, can defy HIPAA , the public policy of this State and this Court's holding in Bedell I.

There is good reason that HIPAA and other courts require return or destruction of medical records produced in discovery. Various companies, including Walgreens,

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[31] State Farm has also asserted that it offered the Plaintiff the liability and UIM policy limits in this case [State Farm Petition p. 4] and such is misleading as State Farm did not do so until after litigation was filed. Nor did State Farm or Defendant Luby provide requested information about other available insurance and assets until such was sought in formal discovery after the case was well underway.

McDonalds[32], LexisNexis,[33] and Montgomery Ward[34] have all failed to keep electronically stored confidential information private, allowing personal data and credit card information to be stolen from computerized databases. Recently confidential data, including social security numbers and other personal information, has been stolen online from ChoicePoint.[35] The AMA recently determined that most hospitals don't monitor their data security.[36] These are just a few examples of stolen electronic data supposedly maintained in a secure manner. It has recently been discovered that sovereign nations like China have stolen data in large quantities from once thought secure databases.[37] What about the bankruptcy and demise of AIG, the world's largest insurer? Who has custody and control of those medical records? Should a claimant in this State be forced by our judicial system to forever relinquish control of personal and private medical information because they had to file a claim in court? **This Court should, and must, say no.** State Farm, a company with approximately 68,000 employees,[38] wants to make accessible to those

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[32] http://cyberinsecure.com/mcdonalds-and-walgreens-customer-email-databases-breached-emails-and-customer-data-stolen/ [email & personal data]

[33] http://articles.sfgate.com/2005-04-13/news/17369844_1_reed-elsevier-lexisnexis-data-brokers [300,000 customers personal data stolen]

[34] http://www.switched.com/2008/07/01/montgomery-ward-parent-company-hacked-victims-not-informed/ [200,000 customers personal data and credit card information stolen]

[35] The Washington Post, 2/17/05 [website reference: http://www.washingtonpost.com/wp-dyn/articles/A30897-2005Feb16.html]

[36] AMA News 11/22/10 [website reference: http://www.ama-assn.org/amednews/2010/11/22/bisc1122.htm]

[37] http://www.nytimes.com/2010/04/06/science/06cyber.html

[38] *See* State Farm's website at http://www.statefarm.com/aboutus/company/company.asp?WT.svl=124.

68,000 employees the Blanks' medical records by scanning them onto the State Farm company wide database.[39] Without a protective order requiring State Farm to return or destroy the Blanks' medical records, the Plaintiff cannot be assured that her confidential medical records will remain private, especially if State Farm may maintain them indefinitely. Moreover, without a protective order, the Plaintiff will have no way of knowing when, who and why her medical records are being viewed by strangers after the case is completed, and, furthermore, proving that such has occurred would be expensive and very difficult, if not impossible. This is exactly why protective orders are authorized by Rule 26(c), because a litigant should not have to file another lawsuit to protect these privacy interests when the Court can provide such protection, through a protective order in the first instance.

Also the Plaintiff needs protection from others who receive such confidential information as part of this case. What about Defendant Luby? What would keep her from disclosing these medical records to others if no protective order is granted. According to the Colorado Intermediate Court of Appeals nothing. *See* A.T. v State Farm, supra, [protective order necessary otherwise disclosure of medical records received in litigation not actionable]. This problem has also happened recently in this State when a disgruntled defendant published a plaintiff's medical records on his website after receiving them in litigation where no protective order had been entered. [*See* West Virginia Association of

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[39] *See* excerpts from the deposition of Thomas Fitzsimmons, a State Farm claims representative attached previously hereto as "Exhibit 4." In his deposition, Mr. Fitzsimmons indicated that medical records are scanned into the claims computer. Fitzsimmons depo. p. 22-23 and p. 31-37. Mr. Fitzsimmons also indicated that State Farm scans all medical records in received regarding a claim, even if the medical records are 1,000 pages or more. Fitzsimmons depo. p. 35-36. Mr. Fitzsimmons also indicated that anyone with a claim number and password could access the medical records scanned onto State Farm's database. Fitzsimmons depo. p. 74. Mr. Fitzsimmons also stated that he has never been informed that State Farm tracks who accesses scanned medical records. Fitzsimmons depo. p. 75.

Justice attorney email inquiry attached as **Exhibit 11**]. Should the plaintiff in that dram shop case be exposed to such embarrassment because she was hit by a drunk driver? Even assuming she can find an attorney to take her case, should she have to file another lawsuit to preserve her privacy? Or should she be able to have protection for her medical records that the trial court required her to produce in the case? The answer is obvious. This scenario is exactly why a protective order is necessary in the case at Bar, and in any case, where production of medical records is necessary.

Accordingly, this Court should not permit Defendant Luby, State Farm, any expert, or any other person or entity who may receive the Blanks' medical records as part of this litigation, to keep copies of those medical records indefinitely, especially when considering that State Farm does not have a very good track record in maintaining the confidentiality of people's medical records. *See* A.T. v. State Farm Ins. Co. supra.

C. The Trial Court's Protective Order Will Not Thwart, or Hinder in any way, the Reporting, Investigating, or Prosecution of Fraudulent Activities

1. The Trial Court's Protective Order Does Not Violate W. Va. Code § 33-41-1 et. seq.

State Farm claims that the Trial Court's Protective Order will prevent it from reporting fraud under W. Va. Code § 33-41-5. Unfortunately for State Farm, the Protective Order does not prevent reporting fraud and this argument is an afterthought and "red herring." This is also part of State Farm's scheme to convince this Court that additional complexities exist in this case, when, in reality, none are present. However, as explained in the Respondent's First Response, State Farm has waived any argument regarding this

issue by failing to argue, in any of its pleadings or documents submitted to the Trial Court, that a Protective Order may violate W. Va. Code § 33-41-5.[40] *See* Whitlow v. Board of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (W. Va. 1993) [Our general rule in this regard is that, when non-jurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal].

State Farm's arguments regarding W.Va. Code § 33-41-5 are devoid of any facts whatsoever. This argument was not presented to the Trial Court because State Farm has no evidence that return or destruction of a litigant's medical records would impede fraud detection. Nor did State Farm want to submit its unsupported contention to discovery by the Plaintiff. State Farm asserts that the Trial Court's Protective Order will prevent it from reporting suspected fraudulent activity. [State Farm Petition, p. 12] State Farm cites various statistics on arrests, indictments and convictions for insurance fraud.[41] The Insurance Commissioner's brief mimics this argument, no doubt having been done in concert with State Farm.[42] State Farm's arguments are essentially "scare tactics" as State

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[40] *See* Respondent's First Response at p. 22-23.

[41] The 2010 Report of the OIC indicates that 6½% of the referrals resulted in conviction [57 out of 872] (http://www.wvinsurance.gov/LinkClick.aspx?fileticket=Hq-kLRl4yKM%3d&tabid=207&mid=799);most convictions were for worker's compensation fraud or related crimes.

[42] The West Virginia Insurance Commissioner should be the protector of insurance consumers and claimants, not the voice of the insurance industry; the WVIC amicus brief provides no guidance to this Court regarding how claimants like Carla Blank will be protected from unauthorized use or disclosure of her medical records if insurance companies are permitted to keep them indefinitely; curiously the WVIC makes no mention of State Farm's erroneous assertion that West Virginia Code of State Rules § 114-57-15.1 applies to claims adjustment conduct which is at issue in this case; wouldn't this Court expect the Commissioner to opine in an amicus brief on whether State Farm is correct in its assertion to this Court that the Regulations provide privacy protection by prohibiting disclosure without her consent? The WVIC did not address this important issue because the WVIC knows that the Regulation does not provide any such privacy protection.

Farm suggests that customers' insurance premiums will rise, and insurance fraud will run rampant if it is forced to return the Blanks' medical records that it obtained through the civil litigation process. State Farm's arguments are unsubstantiated and fail to explain how returning or destroying the Blanks' medical records, five years after the termination of this litigation, will, in any way, hinder its ability to report any suspected insurance fraud to law enforcement authorities, if such ever occurs.

The pertinent statutory section [§ 33-41-1 et. seq.] was intended to permit the Insurance Commissioner's Fraud Unit to investigate insurance fraud and aid law enforcement and prosecutors, not to authorize State Farm to keep a "dossier" of claimants' confidential medical records.[43] While fraud prevention is an amiable goal, this Court has held that fraud prevention is not a sufficient reason to allow unauthorized communications involving the disclosure of one's confidential medical information. *See* Morris, 191 W. Va. 426, 431, 446 S.E.2d 648, 653. ("Although we disapprove of any fraud and obviously agree that an alleged fraud should be investigated, we do not find that this is a sufficient reason to ignore the principles behind prohibiting unauthorized *ex parte* communication which involves the disclosure of confidential information[.]") Ultimately, the Morris Court held that preserving the fiduciary relationship and private communications between a physician and a patient[44] was a sufficient reason to prohibit a third party from having *ex parte* communications regarding the patient's confidential medical information. Id., 191 W.

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[43] W. Va. Code § 33-44-1 provides that "[t]his article is intended to permit use of the expertise of the commissioner to investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively, and to assist and receive assistance from state, local and federal law-enforcement and regulatory agencies in enforcing laws prohibiting crimes relating to the business of insurance."

[44] Morris specifically dealt with a claimant in a workers' compensation proceeding.

Va. at 432, 446 S.E.2d at 654. Importantly, the Morris Court specifically stated that "our holding will not end fraud investigations." Id. The same answer is true for State Farm's "Chicken Little's the Sky is Falling" argument. Surely, maintaining the privacy of thousands of claimants' medical records outweighs the small speculative benefit that indefinite retention and unconsented dissemination to third party's may bring to State Farm or any other liability insurance carrier.

Neither the WVIC nor State Farm indicates if, or how often, medical records are ever requested by the Fraud Prevention Unit and for what purposes such may be used. Additionally, neither entity even attempts to proffer any alleged benefits of receiving such confidential documents from an insurance company like State Farm, rather than directly from the medical provider. Likewise, State Farm does not indicate how often insurance fraud investigations require a review of medical records. Furthermore, even if the Fraud Prevention Unit was in need of someone's medical records, it would not need to acquire them from State Farm, as the Fraud Prevention Unit could acquire, through the court process, any necessary medical records directly from the health care provider or the third party payor of those medical services. Although the WVIC Fraud Unit may serve grand jury or court subpoenas [W. Va. Code § 33-41-8(c)(3)], the Legislature determined not to grant the Fraud Prevention Unit the power to issue their own subpoenas. Most likely the Legislature wanted the review by County prosecutors and the court before permitting such power to compel production of documents and information. Thus, this Court should be circumspect about providing the WVIC with a "back door" method to obtain medical records indirectly, which the Legislature refused to grant directly. *Expressio unius est exclusio*

alterius [the express mention of one thing excludes all others].

Ultimately, the WVIC Fraud Unit can still investigate and prevent insurance fraud even if State Farm is not permitted by the Trial Court to retain Carla Blank's medical records beyond 5 years after the case has ended. Also ,State Farm and any other liability insurance carrier can detect and report potential fraud without permanent retention of claimants' medical records. Likewise, neither State Farm nor any other liability insurance carrier should be permitted to transfer confidential medical records to anyone, including the WVIC, without the protections of a grand jury subpoena, Court order, or subpoena issued by a court, absent the consent of the person whose medical records are being sought.[45]

To support its argument that indefinite retention and unconsented dissemination of a claimant's medical records should be permitted by the Court, State Farm wants to use a sledgehammer to kill a gnat! Random vehicle stops and unregulated road blocks, as well as dispensing with the Fourth Amendment altogether, would undoubtedly make fraud investigations, and detection of crime generally, much more efficient, and reduce all types of crimes, including serious violent crimes, but the concomitant loss of privacy and personal liberty by the people would be too great a price to pay for such governmental efficiency. State Farm is not entitled to wield such power just to swat at a gnat with a sledgehammer.

Accordingly, the Trial Court's Protective Order does not violate W. Va. Code § 33-

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[45] The requirement of a subpoena should present no obstacle in legitimate fraud investigations as any insurer will be able to relate to the WVIC Fraud Unit, or any other investigative body, that "John Doe" has made five claims in the last 2 years for back and neck injuries from rear-end car collisions, or slip and falls, and that all claims were treated by the same healthcare provider; transmission of the claimants' medical records would not be necessary to begin an investigation on such facts and, if warranted, the medical records could easily be obtained through a grand jury subpoena or other judicial process, even on an *ex parte* basis.

41-1 et. seq., and the Protective Order will not hinder, in any manner, the reporting or prosecution of fraudulent conduct.

D. The Defense Trial Counsel's "Fears" are Unfounded and Unsupported

The Defense Trial Counsel amicus brief [hereinafter "DTC"] claims, without any support, that it "is an onerous and unnecessary burden on defense counsel" for its members to certify that "the client, any expert, and the client's insurer has destroyed or returned all medical records". [DTC Amicus brief, p12] Such an argument is absurd. Certifications have been used repeatedly for many years when confidential documents protected by a Rule 26 order are provided by counsel to experts, or other persons necessary to assist in preparation of a case. The same procedure must be followed by any party-plaintiff or defendant-who receives the protected material. How else would DTC like for compliance to occur? Or do they desire no compliance and allow confidential documents become someone's wallpaper, including those produced by insurance companies or other defendants?[46]

The certification procedure is simple and a minor inconvenience to counsel. Certification is merely a letter from counsel of record filed with the Clerk, that he or she has requested and received an affidavit or other confirmation from the expert, or whomever counsel provide the protected confidential material, that such person has returned or destroyed all such confidential materials received in the case and has kept no

[46] Attached as "**Exhibit 12**" is a protective order in an unrelated bad faith case with Nationwide Insurance Company where this same certification procedure was requested by counsel for State Farm in this case.

copies.[47] (*See* also Exhibit 6).

Additionally, the DTC's claim that its members may be subject to potential liability is theoretically correct if any such member should violate the trial court's protective order or do something that's "really stupid" or "really mean," but everyone else is also subject to the same obligations to act in accordance with the trial court's order and the law. TXO Production Corp. v Alliance Resources Corp., 187 W. Va. 457, 473, 419 S.E.2d 870, 886 (1992).[48]

Ultimately, the arguments made by DTC should be of no consequence to this Court's decision in this matter.

E. The Trial Court's Protective Order does Not Mandate Destruction of the Entire Claim File at the Conclusion of this Litigation

State Farm is concerned that the Trial Court's use of the term "medical information" would require State Farm to destroy its entire claim file upon conclusion of the time period set forth in W. Va. C.S.R. § 114-15-4.2(b). [State Farm Petition, p.14] Essentially, State Farm is arguing that "we can't keep anything unless we can keep everything." Such is completely inaccurate, and State Farm's assertion is disingenuous and serves no purpose other than to distract this Court from other legitimate issues presented in this case.

The term "medical information," as used by the Trial Court, refers to wholesale

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[47] Of course the expert would have already received the trial court's Rule 26 protective order and agreed to abide by its terms.

[48] The "really stupid" and "really mean" descriptions were abandoned by this Court in Alkire for use in evaluating punitive damage verdicts but are still applicable in this matter; Syl. Pt. 6, Alkire v First Nat. Bank, 197 W. Va. 122, 475 S.E.2d 122 (W. Va. 1996).

reproduction of information in the Blanks' medical records that would be, in essence, a replication of the medical record. "Medical information" does not encompass "injury" information, i.e. information describing the Blanks' injuries at issue in this suit, which may be placed in the claim file, such as "lower back injury", "broken left foot", or "fractured skull." Importantly, the Protective Order does not require the return or destruction of documents which contain "injury" information. Nor does it anywhere require destruction of the entire claim file. As such, entries in the claim file which describe injuries in a manner such as "broken leg," "scarring," or "injury to chest" would not be considered medical records or "medical information" that would need to be returned or destroyed by State Farm.

Ultimately, the Trial Court's use of the term "medical information" was to prevent anyone who receives the Blanks' medical records, such as State Farm, from circumventing the Trial Court's Protective Order by retyping or copying, in toto, all of the medical information in an effort to essentially recreate the Blanks' medical records. If the Protective Order did not mandate that "medical information" be returned or destroyed then the Defendants, or the Defendants' insurance companies, could circumvent the Protective Order by creating duplicates of the Blanks' medical records. The Plaintiff never requested, and the Trial Court never considered, whether State Farm would be required to destroy its entire claim file. State Farm, knew, or should have known, that the Protective Order did not require destruction of the entire State Farm claim file. However, and very importantly, if State Farm had any uncertainty regarding the Trial Court's meaning of the term "medical information" it should have sought clarification from the Trial Court, as it is required to do by this Court's decisions. Whitlow, supra. Instead, State Farm chose to delay the case,

waste this Court's time, and present an argument which State Farm knows is not a real issue in this case as there has never been any assertion by any party in this case that State Farm should destroy its entire claim file. Such issue was not presented to the Trial Court, nor did the Trial Court decide such issue. State Farm is intentionally misconstruing the Trial Court's Protective Order so as to exaggerate the matter to this Court. Such conduct should not be tolerated and if State Farm was confused about the Trial Court's use of the term "medical information," then it should have sought clarification from the Trial Court rather than seek an extraordinary writ.

Accordingly, this Court should disregard State Farm's erroneous assertion that the Trial Court Order requires it to destroy its entire claim file.

IV. Incorporation of First Response

The Respondent herein, Plaintiff below, hereby incorporates by reference her First Response to State Farm's Petition, which was filed at the request of this Court pursuant to Rule 14(b) [since revised] of the Appellate Rules before the show cause order was issued. Although some of the arguments set forth in this Rule 14(d) [now Rule 16(g)] Response overlap those presented in the First Response, the Respondent did not restate all of her previous arguments herein.[49] Accordingly, the Respondent would ask the Court to consider the First Response for augmentation and clarification if necessary.

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[49] For example, the Plaintiff did not restate her argument from Section VIII. "Illinois Law has no Bearing on the Trial Court's Ability to Enter the Protective Order" from her First Response.

V. Conclusion

WHEREFORE, based on the reasons set forth herein, this Court should deny State Farm's Writ as improvidently granted, or alternatively deny State Farm's Writ based on its lack of merit. The Court should further find that the Trial Court reasonably exercised its discretion under Rule 26(c) as a Protective Order was warranted in this case as a litigant's medical records are inherently confidential and worthy of protection from indefinite retention or unconsented dissemination, as determined by the Trial Court in this case.

Respectfully submitted,
Respondent, Plaintiff Below, By Counsel

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CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 7th day of January, 2011, I served the foregoing "RESPONDENT'S RULE 14(d) [now Rule 16(g)] RESPONSE TO STATE FARM'S PETITION FOR WRIT OF PROHIBITION" and "RESPONDENT'S APPENDIX " upon the below listed counsel of record via United States Mail to them at their Office addresses:

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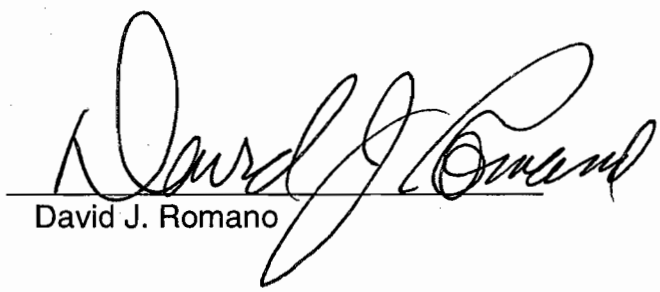

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